decided to sell sixty-seven of those Commission regulated telephone exchanges located throughout the State of South Dakota.

A consortium of buyers (which included the CRSTTA) formed to bid on the exchanges. Initially, the CRSTTA successfully bid on the Morristown, Nisland and Timber Lake exchanges. The CRSTTA entered into an agreement with US West to purchase those exchanges on December 7, 1994.

On December 20, 1994, US West and the consortium filed an application with the Commission seeking approval of the sale of the sixty-seven exchanges. US West specifically sought (1) a declaration from the Commission that the sale did not require the Commission's approval, or in the alternative, that the Commission knew of no reason why the sale should not occur; and (2) an order from the Commission that US West's gain from the sale would be considered as non-operating income and therefore not considered in US West's future rate-making requests to the Commission. The record reflects that even if the Commission decided that the sale

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SDCL 49-31-1.1 (Noncompetitive service defined); SDCL 49-31-3 (General supervision of telecommunications companies offering common carrier services by commission where not preempted - Filing application with commission - Demonstration of capabilities - Rules - Offering services without certificate of authority as misdemeanor); SDCL 49-31-3.1 (Approval required for discontinuance of noncompetitive telecommunications service); SDCL 49-31-4 (Determination and approval of rates and prices by commission - Attribution of revenues, investments and expenses - Rules); SDCL 49-31-7 (Improvement of business and equipment - Notice to company from commission); SDCL 49-31-7.1 (Powers and duties of commission); SDCL 49-31-11 (Discrimination prohibited - Civil fine); SDCL 49-31-18 (Access provided to companies doing business in same vicinity - Discrimination prohibited); SDCL 49-31-19 (Tariff of access charges - Approval by commission); SDCL 49-31-20 (Merger or consolidation between competing telecommunications companies prohibited - Authority of commission to permit exceptions).

did not require its approval, US West would not have sold the exchanges in the absence of this second assurance.[4]

The CRSTTA later decided that it wanted to purchase the McIntosh exchange instead of the Nisland exchange. US West and the CRSTTA modified their agreement accordingly; and on April 28, 1995, US West amended its application to effect this change. Under the amended application, US West sought approval to sell the McIntosh, Morristown and Timber Lake exchanges to the CRSTTA.

At the time of the original application, no statute explicitly required that proposed sales of local telephone exchanges be approved by the Commission. The Commission had accepted jurisdiction to hear the original application pursuant to its general authority to regulate local telephone service and facilities under 47 USCS § 152(b) and SDCL Chapter 49-31.[5] On March 30, 1995, (after the purchase agreement had been signed for the Morristown and Timber Lake exchanges, but before any hearings on the applications were conducted), the South Dakota Legislature enacted Senate Bill 240. That law, codified at SDCL 49-31-59, contained an "emergency clause" and became effective on March 30, 1995. Under the new law, sales of local telecommunications exchanges were specifically required to be approved by the Commission.

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[4] Although the application sought orders on both issues, this appeal only involves the Commission's disapproval of the sale of the McIntosh, Morristown and Timber Lake exchanges.

[5] See, supra, note 2.

The new law also required the Commission to give separate consideration to the facts and circumstances of each exchange. The Commission was to specifically consider: (1) the protection of the public interest; (2) the adequacy of local service; (3) the reasonableness of rates for local service; (4) the payment of taxes; and, (5) the ability of the local company to promote economic development, tele-medicine and distance learning. SDCL 49-31-59. The Commission applied the new law when it considered the proposed sale of all three exchanges.

In April and May of 1995, approximately six evidentiary hearings were held throughout the State to receive public input on the original application. A public hearing was conducted in May of 1995 on the amended application. A final hearing on the proposed sale of all exchanges was conducted between June 1 and June 4, 1995.

After considering some post-hearing exhibits and briefs, the Commission voted unanimously to not approve the sale of the three exchanges at issue here. In its written Findings of Fact, the Commission found, among other things, that: (1) the CRSTTA refused to waive its sovereign immunity in regard to the collection of taxes and the authority of the Commission to regulate phone service in the three exchanges; (2) at the time of the final hearing, the CRSTTA had not entered into any agreement with the State of South Dakota to permit State regulation or the collection of taxes by the CRSTTA either on or off the Cheyenne River Indian Reservation; and, (3) the two main concerns of the public who opposed the sales were the loss of Commission "oversight" and the loss of tax revenues from US West.

The Commission did not, however, enter findings on each of the other factors set forth in SDCL 49-31-59.[6]

The Commission ultimately denied the application for three principal reasons. First, the Commission noted that the CRSTTA would not waive its sovereign immunity and therefore the Commission would lose its regulatory authority over the three exchanges. Second, the Commission found that the sale would have significant adverse tax consequences in the cities, counties and school districts located within the exchanges because the CRSTTA would not be liable for the taxes that had previously been paid by US West. The Commission finally concluded that it was without authority to approve the sale because it believed that under SDCL 49-1-17, an approval would constitute an illegal delegation of the Commission's regulatory authority to the CRSTTA and the CRST.

DESCRIPTION OF THE PARTIES

At the outset, it is important to describe the parties and the telephone exchanges. The Commission is a constitutionally created agency of the State of South Dakota. It is responsible for the regulation of intrastate telephone service, companies and facilities in South Dakota. "The [C]ommission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation." SDCL 49-31-3. These local exchanges are

[6] On remand, the Commission should enter findings on each of the five factors that the Legislature has required to be considered.

not "otherwise regulated by federal law or regulation." On the contrary, Congress has delegated the authority to regulate local telephone service and facilities to the states. See 47 USCS § 152(b).

US West is a Colorado corporation which provides local exchange telecommunication service, interexchange carrier access, interLATA interchange telecommunication services, and other telecommunication services throughout South Dakota. US West or its predecessor, Northwestern Bell Telephone Company, has provided these services, and other communication services, throughout South Dakota for decades.

During that time, US West's local exchanges have been regulated by the Commission. US West has made frequent applications to the Commission. US West has also litigated jurisdictional questions and rate-making issues before the Commission on numerous occasions. There is no evidence that US West has ever objected to Commission jurisdiction over exchanges on an Indian reservation prior to this proceeding.

US West is not a tribal entity. Consequently, it has always paid taxes to the State for the benefit of the counties, cities and school districts in the exchanges. On the other hand, because the CRSTTA is an entity of the CRST, the CRSTTA has no liability for the taxes US West has always paid. Furthermore, the CRSTTA is not subject to Commission regulation.

These differences exist because the CRST is a federally recognized Indian tribe. In 1868, the Great Sioux Reservation was established for the use and

occupancy of the Sioux Nation by the Fort Laramie Treaty, 15 Stat. 635. Later, in 1889, Congress created the Cheyenne River Indian Reservation on part of the treaty land as a separate reservation for the CRST. See South Dakota v. Bourland, 508 US 679, 113 SCt 2309, 124 LEd2d 606 (1993). In 1908, a significant portion of the reservation was opened to non-Indian settlement, but the reservation was not diminished. See Solem v. Bartlett, 465 US 463, 104 SCt 1161, 79 LEd2d 443 (1984). The reservation encompasses both Dewey and Ziebach Counties. Reservation residents include tribal members, non-member Indians and non-Indians. The constitution and bylaws of the CRST do not permit non-member Indians or non-Indians to vote in tribal elections. United States on Behalf of Cheyenne River Sioux Tribe v. South Dakota, et al., Nos. 95-2529, 95-2535, 95-2720, slip op. at 14 (8th Cir Jan. 17, 1997).

The CRSTTA is a wholly owned subsidiary corporation of the CRST. The CRSTTA was incorporated by tribal ordinance to construct, own, maintain and acquire telecommunication exchanges and conduct business within the State of South Dakota. The CRSTTA has provided telephone communications services, primarily within the Cheyenne River Indian Reservation, since 1958. The CRSTTA provides telecommunication services to tribal and non-tribal members primarily within Dewey and Ziebach Counties. The CRSTTA also manages a cable television business, a propane gas company, a retail office supply store, a commercial print business, a motel and a supermarket.

THE EXCHANGES

Of the three of the telephone exchanges involved, only Timber Lake has any presence on the Cheyenne River Indian Reservation. Approximately one-half of the Timber Lake exchange's service territory is located within the boundaries of the Cheyenne River Indian Reservation. The remaining portion of the service territory falls within the boundaries of the neighboring Standing Rock Indian Reservation in Corson County.

The Timber Lake exchange serves the City of Timber Lake in Dewey County. Timber Lake is the county seat of Dewey County. According to the 1990 census, approximately two-thirds of the population of Timber Lake are non-Indians. When the surrounding area of the Timber Lake exchange is considered, approximately 80% of the population is non-Indian. Non-Indian and non-member Indian telephone subscribers have no vote or political voice in the government of the CRSTTA or the CRST.

The McIntosh exchange serves the City of McIntosh and the surrounding farm and ranch community. The City of McIntosh is the county seat of Corson County. No part of the McIntosh exchange is located on the Cheyenne River Indian Reservation. This exchange is located within the boundaries of the Standing Rock Indian Reservation. The population residing in this exchange consists primarily of individuals that are not members of the Standing Rock Sioux Tribe. Neither Standing Rock Sioux Tribal members, CRST members, nor non-Indians who reside

in this exchange have a vote or political voice in the government of the CRSTTA or the CRST.

The Morristown exchange serves the City of Morristown and the surrounding farm and ranch community. No part of the Morristown exchange lies within the Cheyenne River Indian Reservation. Like the McIntosh exchange, the Morristown exchange is located within the boundaries of the Standing Rock Indian Reservation. Neither Standing Rock Sioux Tribal members, CRST members nor non-Indians who reside in this exchange have a vote or political voice in the CRSTTA or the CRST.

STANDARD OF REVIEW

Issues I through V are questions of law. The standard of review applicable to questions of law is well settled. Island v. Dept. of Corrections, 1996 SD 28, ¶6, 545 NW2d 201. Decisions involving questions of law are "fully reviewable, with no deference given to the [Commission's] conclusions of law." Thomas v. Custer State Hospital, 511 NW2d 576, 579 (SD 1994). See also Island, 1996 SD 28 at ¶6 (citing Permann v. South Dakota Dept. of Labor, 411 NW2d 113, 115-17 (SD 1987)).

Issue VI is a question of fact. Questions of fact are judged by the clearly erroneous standard. Therkildsen v. Fisher Beverage, 1996 SD 39, ¶8, 545 NW2d 834. "Under this standard, [this Court] must determine whether there [i]s substantial evidence to support the [Commission's findings]." Id. "'[T]he question is not whether there is substantial evidence contrary to the [Commission's] finding[s], but whether there is substantial evidence to support the [Commission's] finding[s] . . .'" Id. (quoting In re SDDS, Inc., 472 NW2d 502, 507 (SD 1991)).

A third standard of review governs those decisions (Issue VI) alleged to be "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." SDCL 1-26-36(6). There are two tests under this standard of review: "one the legal, or whether there is authority, and second, the factual, or whether the circumstances justify the decision . . . ." Iversen v. Wall Bd. of Educ., 522 NW2d 188, 192 (SD 1994).

> The legal aspect is the authority under which a decision maker acts, whether provided by statute, administrative rule, or policy. Decision [sic] and actions exceeding the bounds of authority constitute an abuse of discretion. Similarly, inaction or indecision, when one is required to perform, is an abuse of discretion. Questions involving authority require no deference to the decision maker, and are freely reviewable by this Court.

Id. at 192-93.

The factual test is "'whether [a Court] believe[s] a judicial mind, in view of the law and the *circumstances*, could reasonably have reached that conclusion." Id. at 192 (citing Dacy v. Gors, 471 NW2d 576, 580 (SD 1991)) (emphasis in original).

> The factual aspect of abuse of discretion is more problematic. On review, each decision should be presumed to have been made within that broad range of discretion which cannot be better determined by the reviewing court. This is true whether the decision maker is a circuit court, administrative agency, or school board. This Court should not substitute its judgment when it has not had the opportunity to hear or see the evidence and determine credibility or the weight to be given to different evidence. However, decisions which are not supported by evidence and are arbitrarily or capriciously made or are clearly unreasonable in light of the evidence, constitute an abuse of discretion.

Id. at 193.

DECISION

I. DOES THE COMMISSION HAVE JURISDICTION OVER US WEST'S PROPOSED SALE OF THE THREE TELEPHONE EXCHANGES?

At the outset, it is important to precisely define the issue to be decided. There is no question that generally, the Commission has jurisdiction over US West's local telecommunication services and facilities under the Communications Act of 1934 and SDCL Chapter 49-31. There is also no dispute that the State has no authority over tribal enterprises like the CRSTTA conducting business on the Cheyenne River Indian Reservation. Because the CRSTTA is one of the prospective buyers, the issue is whether the Commission's statutory jurisdiction to disapprove sales of US West local telephone exchanges is either pre-empted by federal law, or unlawfully infringes on the right of the CRST to make its own laws and be ruled by them.[7]

An analysis of this issue must begin with an examination of the legal principles governing non-Indian activity on and off Indian reservations. Preliminary, it is observed that "[l]ong ago, the [United States Supreme] Court

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[7] The CRSTTA asserts that the CRST and the Standing Rock Sioux Tribe have exclusive jurisdiction to regulate the sales of US West's exchanges. They argue there is no room for concurrent state jurisdiction. Although the CRST may generally regulate non-members such as US West who enter into consensual relationships with members of the CRST through commercial dealings, contracts, leases or other arrangements on the Cheyenne River Indian Reservation, Montana v. United States, 450 US 544, 565, 101 SCt 1245, 1258, 67 LEd2d 493, 510 (1981), two of the three exchanges at issue are not located within the Cheyenne River Sioux Reservation, and only a portion of the remaining exchange is on that reservation. Furthermore, the Standing Rock Sioux Tribe is not a party asserting jurisdiction. In any event, assumming that both tribes have some jurisdiction to regulate US West's on reservation activities, the question is whether the Commission had jurisdiction over the sales.

departed from Mr. Chief Justice Marshall's view that 'the laws of [a state] can have no force' within reservation boundaries . . . ." White Mountain Apache Tribe v. Bracker, 448 US 136, 141, 100 SCt 2578, 2582, 65 LEd2d 665, 671 (1980) (quoting Worchester v. Georgia, 6 Pet 515, 561, 8 LEd 483, 501 (1832)). There are, however, "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." Bracker, 448 US at 142. "First, the exercise of such authority may be pre-empted by federal law." Id. (citing Warren Trading Post Co. v. Arizona State Tax Commission, 380 US 685, 85 SCt 1242, 14 LEd2d 165 (1965)). "Second, it may unlawfully infringe 'on the right of reservation Indians to make thier [sic] own laws and be ruled by them.'" Id. (quoting Williams v. Lee, 358 US 217, 220, 79 SCt 269, 271, 3 LEd2d 251, 254 (1959)).

These "two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation . . . ." Id. at 143. Despite their independence, however, the barriers are related in the sense that "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress" and "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' . . . against which vague or ambiguous federal enactments must always be measured.'" Id. (emphasis added) (internal citation omitted).

With regard to the first barrier, the United States Supreme Court has noted that the pre-emption analysis in this setting is unique:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.

Bracker, 448 US at 143 (internal citation omitted).

There are three further refinements depending on the parties and the location of the conduct sought to be regulated. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." Id. at 144 (emphasis added). In contrast, in a case like this where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," the inquiry is significantly more detailed. Id. (emphasis added).

> In such cases [a court must] examine[ ] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. at 145. See also New Mexico v. Mescalero Apache Tribe, 462 US 324, 333, 103 SCt 2378, 2386, 76 LEd2d 611, 620 (1983). Finally, when the activity extends beyond reservation boundaries, (like the CRSTTA's jurisdictional claims over exchanges located on the neighboring Standing Rock Indian Reservation), "'a nondiscriminatory state law' is generally applicable in the absence of 'express federal law to the contrary.'" Bracker, 448 US at 144 n 11 (citing Mescalero Apache Tribe v. Jones, 411 US 145, 148-49, 93 SCt 1267, 1270, 36 LEd2d 114, 119 (1973)) (emphasis added).

The second general barrier also involves the Federal Government's long-standing policy of encouraging tribal self-government. Iowa Mutual Ins. Co. v. LaPlante, 480 US 9, 14, 107 SCt 971, 975, 94 LEd2d 10, 18 (1987). "This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory' to the extent that sovereignty has not been withdrawn by federal statute or treaty." Id. (quoting United States v. Mazurie, 419 US 544, 557, 95 SCt 710, 717, 42 LEd2d 706, 716 (1975)) (internal citation omitted). "[A]bsent governing Acts of Congress, the [second] question has always been whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 US 217, 220, 79 SCt 269, 271, 3 LEd2d 251, 254 (1959) (emphasis added). It is important to note, however, that tribal interests are not the sole concern. "The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the

Federal Government, on the one hand, and those of the State, on the other. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 US 134, 156, 100 SCt 2069, 2083, 65 LEd2d 10, 31 (1980).

A. Is the Commission's authority pre-empted by federal law?

Under the first barrier, a state may not assert regulatory authority over tribal reservations and members when "the exercise of such authority [is] pre-empted by federal law." Bracker, 448 US at 142. When on reservation conduct is at issue, Bracker requires courts to examine the pre-emption doctrine in light of the nature of the state, federal and tribal interests at stake.[8] Id. at 144-45. Here, an examination of the differing interests at stake reveals that Commission's jurisdiction has not been pre-empted because Congress has authorized Commission jurisdiction, because South Dakota's interests are significant, and because Commission jurisdiction does not "interfere," nor is it "incompatible," with tribal interests. See New Mexico, 462 US at 334 (citing Bracker, 448 US at 145).[9]

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[8] Because approximately one-half of the Timber Lake exchange is on the Cheyenne River Indian Reservation, the Commission's disapproval of the sale of the Timber Lake exchange involved the Commission's regulation of "the conduct of [US West] engaging in activity on th[at] reservation." Bracker, 448 US at 145.

[9] In Bracker, the United States Supreme Court summarized the focus as follows:

> Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes [Arizona] seek[s] to impose, and where [Arizona] [i]s unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.

Bracker, 448 US at 151.

US 355, 360, 106 SCt 1890, 1894, 90 LEd2d 369, 376 (1986) (emphasis added) (internal citation omitted). Instead, Congress has delegated intrastate jurisdiction over local exchange service and facilities to state utility commissions.

This Act of Congress is significant. First, the federal legislation clearly belies any claim of "comprehensive" federal regulation of local exchanges. It also demonstrates Congress' intent that the states exercise the ceded jurisdiction over local exchanges.

In Rice v. Rehner, 463 US 713, 726, 103 SCt 3291, 3299, 77 LEd2d 961, 974 (1983), the United States Supreme Court concluded that federal statutes may authorize, rather than pre-empt, state regulation. The dual regulatory structure created by § 152(b) of the Communications Act of 1934 requires the same conclusion with respect to the regulation of local exchange service and facilities. Congress has delegated jurisdiction over local exchange service to state commissions. Because Congress has anticipated that the federal government would rely heavily on state jurisdiction, no federal telecommunications interest or policy is threatened.[11]

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[11] This same reasoning was recently employed by the Eighth Circuit Court of Appeals in Lower Brule Sioux Tribe v. State of South Dakota, No. 96-1692, slip op. at 13 (8th Cir Jan 9, 1997). In that case, the Lower Brule Sioux Tribe brought an action to enjoin the State of South Dakota from enforcing its hunting and fishing laws over any person within the boundaries of the reservation. The Tribe argued that Congress had pre-empted all state jurisdiction. The Court rejected the Tribe's argument concluding that "[i]t is apparent from the language of the Flood Control Act of 1944 that Congress did not preempt state law." Id. The Court noted, "[i]n light of the fact that there are no comprehensive federal hunting and fishing regulations in effect for the taken areas, we agree . . . that . . . Congress anticipated that the federal government would rely heavily on state regulation." Id.

Consequently, Commission jurisdiction is authorized rather than pre-empted by federal statute.

Tribal Interest

In addition, general federal Indian policy and Tribal interests are not threatened by the Commission's exercise of jurisdiction.[12] The Telecommunications Act of 1996, Pub. L. No. 104-104 (1996) (to be codified at 47 USC §§ 151 et seq.), was signed into law after oral argument was held in this case. Under that Act, US West may no longer maintain its monopoly over these local exchanges. Competition by others, like the CRSTTA, is now encouraged. In addition, under section 251(b)(1)

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[12] In Bracker the Supreme Court noted several Indian policies that would be obstructed by the imposition of taxes by Arizona. First, "[a]t the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding . . . .'" Bracker, 448 US at 149 (citing 25 CFR § 141.3(a)(3) (1979)). "That objective is part of the general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.'" Id. (citing Mescalero Apache Tribe v. Jones, 411 US 145, 93 SCt 1267, 36 LEd2d 114 (1973)). Second, the Arizona taxes "would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber." Bracker, 448 US at 149. In particular, "assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors." Id. Third, "the imposition of state taxes would adversely affect the Tribe's ability to comply with sustained-yield management policies imposed by federal law." Id. at 149-50. Such measures employed included "reforestation, fire control, wildlife promotion, road improvement, safety inspections, and general policing of the forest." Id. at 150. Because these measures require substantial expenditures, which would be taken from tribal revenues, "[t]he imposition of state taxes on . . . contractors would effectively diminish the amount of those revenues and leave the Tribe and its contractors with reduced sums with which to pay out federal required expenses." Id. As explained hereafter, these effects do not occur under the Communications Act of 1934 and The Telecommunication Act of 1996.

of the 1996 Act, US West has "[t]he duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of [their] telecommunications services" to the CRSTTA. 47 USC § 251(b)(1) (emphasis added). Therefore, even if the CRSTTA does not purchase these exchanges, it is now free to operate its own local service in the same exchange territory. In fact, the CRSTTA is not only free to operate in the same territory, it is encouraged to compete without the purchase by reselling telecommunications services from US West without fear of discrimination or unreasonable conditions.

Therefore, unlike Bracker, Commission jurisdiction over the proposed sales does not undermine "the general federal [Indian] policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs." Bracker, 448 US at 149. The Commission's disapproval of the sale will not usurp the CRST's authority, nor will it impose a legal barrier for the CRST to raise revenue as the Commission's disapproval has no legal impact on tribal self-government or tribal business and economic affairs. The CRSTTA is not only free, but is encouraged, to enter this market and provide its own local telephone service in the same territory without purchase of the exchanges. Under these circumstances, Commission disapproval of the sales will not "preclude tribal businesses from engaging in commercial activities in Indian country." Appellants' Joint Reply Brief at 17. Commission jurisdiction over this sale has no legal impact

on tribal self sufficiency, tribal independence, or economic development. Any other impact does not rise to the level prohibited in Bracker.[13]

State Interest

Finally, the State's interest in Commission jurisdiction is entirely justified. Unlike Bracker,[14] the activity involved -- Commission regulation of local telecommunications sales, services and facilities -- is a responsibility and service that Congress has long recognized as a significant governmental function. Since at

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[13] Counsel for the CRSTTA conceded at oral argument that there are other types of non-Indian commercial enterprises on the reservation that presently operate in competition with the CRST.

Counsel for the CRSTTA and US West also responded to the Court's inquiry as to why the CRSTTA and a non-tribal entity could not both operate local exchange services. Mr. Heaston and Mr. McElroy stated that it was not "realistic" considering the nature of the telephone business. Mr. Heaston pointed out that under South Dakota law, local telephone exchanges could not have competitors unless they could show the existing service provider did not provide adequate service. Mr. Heaston concluded "so it really is not realistic given the record that anybody else would come in to be an alternate provider here." However, all of that has changed since the passage of The Telecommunications Act of 1996. Furthermore, counsel have not briefed, argued or identified any record evidence of other practical difficulties the CRSTTA may have in providing local service without the purchase of these exchanges.

[14] In Bracker, the Supreme Court noted that the Arizona had not "justified [its] taxes except in terms of a generalized interest in raising revenue . . . ." Bracker, 448 US at 151.

> [T]his is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor [has the State] been able to identify a legitimate regulatory interest served by the taxes [it] seek[s] to impose. [The State] refer[s] to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on one Fort Apache Reservation.

Id. at 150 (emphasis added). Commission regulation of telecommunications is entirely different.

least 1934, the federal government has specifically recognized that the state and federal governments have a significant governmental interest in the regulation of telecommunications services and facilities, including state regulation of local exchange service. See Communications Act of 1934 and The Telecommunications Act of 1996.

Furthermore, the state's declared interest in telecommunications regulation (including these sales) is intended to protect the interests of all the subscribers who might be affected by a sale of a local exchange, as well as all other citizens of the state. Protection of both interests is expressed in the language of SDCL Chapter 49-31 (general regulation of services) and SDCL 49-31-59.

> The Legislature recognizes that the sale of telephone exchanges has a profound impact upon South Dakota, especially during a time when the world is undergoing a revolution in telecommunications technology. Because the sale of any exchange in our state directly affects the continued vitality and viability of rural South Dakota during that revolution, it is the Legislature's intent that the sale of each exchange be held to a high degree of scrutiny.

SDCL 49-31-59.

Here, each of the three exchanges contains a captive group of Indian, non-Indian and non-tribal-member subscribers who must rely on the exchanges for telecommunications services. Although a part of the Timber Lake exchange is on the Cheyenne River Indian Reservation, the vast majority of the Timber Lake subscribers, and none of the Morristown and McIntosh subscribers, have any political voice in the CRSTTA or the CRST. Therefore, absent Commission jurisdiction, only an extremely small percentage of subscribers would have the

protection of government regulation of sales by an entity in which the subscribers have a political voice. Under those circumstances, the Commission has a governmental interest in providing regulation to all subscribers of the exchanges.

Moreover, unlike Bracker, US West's proposed sale extends beyond reservation boundaries. It is not a "reservation operation" conducted "solely" (or even primarily) within the confines of the Cheyenne River Indian Reservation for its members. The United States Supreme Court "has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." Bracker, 448 US at 151.

Here, the Commission has identified off-reservation effects that necessitate Commission intervention. Because "[a] State's regulatory interest will be particularly substantial if the state can point to off reservation effects that necessitate state intervention," New Mexico, 462 US at 336, the Commission's interest at stake precludes federal preemption. As Bracker itself recognized, "[i]n the case of 'Indians going beyond reservation boundaries,' . . . 'a non-discriminatory state law' is generally applicable in the absence 'express federal law to the contrary.'" Bracker, 448 US at 145 n 11 (citing Mescalero, 411 US at 148-149).[15]

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[15] Although the Standing Rock Sioux Tribe has supported the CRSTTA's acquisition of the exchanges on the former Reservation, the fact remains that the CRSTTA is claiming jurisdiction over all three sales even though relatively few

To summarize, there is no vague or ambiguous federal law to construe. Here, Congress has specifically contemplated state authority to regulate the activity at issue. Consequently, the Commission's exercise of jurisdiction over US West's proposed sale of its local telephone exchanges is in accordance with federal interest and policy. Furthermore, Commission jurisdiction imposes no legal impediment to the CRST's operation of its own telephone business in the same service territory. Commission jurisdiction does not interfere with Reservation resources or existing CRSTTA service in these exchanges. Recent federal legislation not only permits, but encourages the CRSTTA to now operate its telephone business in these exchanges even if they are not purchased. Therefore, any alleged loss of tribal revenue is only a speculative future business expectation. In any event, the alleged loss of future business revenue is not equivalent to that observed in Bracker. Moreover, most of the exchange territory lies outside the boundaries of the Cheyenne River Indian Reservation and few subscribers are members of the CRST. For all these reasons, Commission jurisdiction does not threaten federal or tribal interests. Finally, the Commission's exercise of jurisdiction is justified. The Commission is performing a significant governmental function. Considering all of the interests at stake, including the nature of the subscribers and the off

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subscribers are members of the CRST living within the boundaries of its reservation. Although Standing Rock Sioux Tribe's support is a public interest consideration for the Commission, that support provides no legal underpinning for the CRSTTA's claim that there is "no room for concurrent" jurisdiction over activities and individuals outside the Cheyenne River Indian Reservation.

reservation effects, exercise of jurisdiction by the Commission does not violate federal law.

B. Would exercise of jurisdiction constitute an unlawful infringement?

The assertion of state regulatory authority over tribal reservations and members may also be precluded if the exercise of such authority unlawfully infringes on the right of reservation Indians to make their own laws and be ruled by them. Bracker, 448 US at 142. Exercise of jurisdiction by the Commission in this case does not, however, unlawfully infringe on the right of the CRST to make its own laws and be governed by them.[16]

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[16] Although it has addressed the second barrier in various contexts, the United States Supreme Court has not delineated clear guidelines to assist courts in determining when state action unlawfully infringes on the right of reservation Indians to make their own laws and be ruled by them. Supreme Court decisions do, however, indicate that considerable latitude is given to states. To constitute an unlawful infringement, a state's action must interfere with "the right of reservation Indians to make their own laws and be ruled by them." Williams, 358 US at 220.

Examples of the Supreme Court's application of this second barrier include Fisher v. District Court, 424 US 382, 96 SCt 943, 47 LEd2d 106 (1976). There, the Supreme Court invalidated an attempt by a Montana state court to assert jurisdiction over an adoption proceeding in which all of the parties were tribal members living on a reservation. The Court rejected the state court's assertion of jurisdiction holding that "[s]tate-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." Fisher, 424 US at 387-88. Importantly, the Court noted that "[n]o federal statute sanction[ed] this interference with tribal self-government." Id. at 388.

On the other hand, in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 US 134, 100 SCt 2069, 65 LEd2d 10 (1980), the Supreme Court approved Washington's imposition of cigarette and tobacco products taxes on sales by tobacco outlets located within the reservation. There, the Court first noted that no federal statute pre-empted the tax. Colville, 447 US at 155. The Court concluded that "Washington does not infringe the right of reservation Indians to

At the outset, it must be reiterated that tribal interests are not the sole concern. The principle of tribal self-government seeks an accommodation between the interests of the Tribe, the Federal Government and those of the State. Colville, 447 US at 156.

Here, an accommodation of the respective interests poses no infringement. First, as was noted in the preemption analysis, South Dakota has a significant stake and governmental interest in the proposed sale of any US West local exchange located in the state. Furthermore, these exchanges are the only present source of local exchange service for the effected subscribers. Without Commission jurisdiction over this sale, most subscribers in the exchanges would be without the benefit of regulatory review of the proposed sale by any governmental entity in which the subscribers have a political voice.

Second, exercise of jurisdiction by the Commission would not "subject a [transaction] arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." Fisher v. District Court, 424 US 382, 387-88, 96 SCt 943, 47 LEd2d 106, 112 (1976). US West's proposed sale

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'make their own laws and be ruled by them' merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving." Id. at 156 (internal citation omitted).

Finally, in Williams v. Lee, 358 US 217, 79 SCt 269, 3 LEd2d 251 (1959), the Supreme Court invalidated state jurisdiction over civil suits by non-Indians against Indians involving actions arising within the reservation. Like Fisher, the Court noted that "[n]o Federal Act ha[d] given state courts jurisdiction over such controversies." Williams, 358 US at 222. The Court concluded that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves." Id. at 223.

does not involve a transaction between CRST members. Furthermore, the McIntosh and Morristown exchanges are not on the Cheyenne River Indian Reservation. Although a part of the Timber Lake exchange is on the Cheyenne River Indian Reservation, few Timber Lake subscribers are members of the CRST. Therefore, the CRSTTA's argument that Commission jurisdiction "goes to the very heart of tribal self-government" is untenable. Although the Standing Rock Sioux Tribe supports the sale, the CRSTTA's "no room for concurrent jurisdiction" argument simply "do[es] not have the same force [when it will be affecting] Indians who are not members of the governing tribe." United States on Behalf of Cheyenne River Sioux Tribe v. South Dakota, et al., Nos. 95-2529, 95-2535, 95-2720, slip op. at 13-14 (8th Cir Jan. 17, 1997) (citing Colville, 447 US at 160-61). "South Dakota retains civil regulatory jurisdiction over nonmember Indians in the same way that it does over non-Indians on the reservation." Id. at 14. See also Colville, 447 US at 160-161.

Third, as was previously noted, the dual regulatory structure contemplated by Congress is not "vague" or "ambiguous." Williams, 358 US at 220. Congress clearly intended that state commissions would have jurisdiction with respect to intrastate facilities. Louisiana Public Service Commission, 476 US at 360; 47 USCS § 152(b). The fact that Congress contemplated Commission jurisdiction over local exchanges severely compromises any argument that exercise of jurisdiction by the Commission constitutes an unlawful infringement. Compare Fisher, 424 US at 388 ("No federal statute sanctions this interference with tribal self-government.");

Colville, 447 US at 155 ("The federal statutes cited . . . cannot be said to pre-empt Washington's sales and cigarette taxes."); and Williams, 358 US at 222 ("No Federal Act has given state courts jurisdiction over such controversies.").

Finally, exercise of jurisdiction by the Commission does not "undermine the authority of the [CRST] over Reservation affairs . . . ." Williams, 358 US at 223. Commission jurisdiction over US West's proposed sale is not an attempt to control tribal affairs on the Cheyenne River Indian Reservation. Under The Telecommunications Act of 1996, the CRSTTA is not only free, but encouraged to operate its telecommunications business in the same service territory. In any event, any alleged interference with tribal revenues is speculative and unproven in this record and it certainly does not rise to the level prohibited in Bracker.

For all these reasons, exercise of jurisdiction by the Commission over the proposed sale does not unlawfully infringe on the right of the CRST to make its own laws and be governed by them.

II. MAY THE COMMISSION CONDITION ITS APPROVAL UPON A WAIVER OF THE CRSTTA'S SOVEREIGN IMMUNITY?

The CRSTTA contends that the Commission's decision to disapprove the sales, in the absence of a CRSTTA waiver of sovereign immunity, violates tribal self-governance principles. The Commission responds that "neither as a matter of fact or law has the Commission in any manner conditioned its holding on the CRSTTA sales in issue here." Appellee's Brief at 26.